

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

RECLAIM THE RECORDS and BROOKE
SCHREIER GANZ,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
VETERANS AFFAIRS, including its
Components, the Office of General Counsel,
the Veterans Benefits Administration,
and the Veterans Health Administration,

Defendant.

18 Civ. 8449 (PAE)

**DECLARATION OF DEANA
M. MARAKOWSKI**

I, Deana M. Marakowski, do hereby declare under penalties of perjury, pursuant to 28 U.S.C. §1746, that the following is true and correct to the best of my knowledge, information and belief:

1. I am a Freedom of Information Act ("FOIA") Officer for the Veterans Health Administration ("VHA") Department of Veterans Affairs ("VA") Central Office ("VACO") Washington, DC.
2. My responsibilities include processing FOIA requests received by the VHA FOIA Office which are assigned to me. I am responsible for advising VHA field FOIA Officers on a routine basis and any other duties assigned that are of a pressing nature for the Agency and the VHA FOIA Office and other duties as assigned.

Reclaim the Records Request FOIA Tracking Number 18-03259-F

3. On September 20, 2017, Brooke Schreier Ganz, President and Founder of Reclaim the Records submitted a FOIA request to the Veterans Benefits Administration (“VBA”) seeking “a copy of the Beneficiary Identification Records Locator Subsystem (BIRLS) Death File.” A copy of the September 20, 2017 FOIA request (the “Request”) is attached hereto as Exhibit A. In the Request, Reclaim the Records claims that the data it was seeking had already been made available to the public and is currently online within at least two major commercial genealogy websites, Ancestry.com and Fold3.com; Reclaim the Records claimed it was now requesting a copy for their organization, so that they could post it online for free public use.

4. The Request was entered by VBA into the VA’s tracking database, FOIAXPress, and assigned request number 18-03259-F. VBA denied the request on January 9, 2018, citing FOIA Exemption 6, which, as stated in the denial letter, “permits VA to withhold a document or information contained within a document if disclosure of the information would constitute a clearly unwarranted invasion of a living individual’s personal privacy.” A copy of the January 9, 2018 letter is attached hereto as Exhibit B.

Referral of FOIA Tracking Number 18-03239-F to VHA

5. Reclaim the Records appealed VBA’s denial for a copy of the BIRLS database disclosed to Ancestry.com several years before. A copy of the April 6, 2018 letter appealing the denial is attached hereto as Exhibit C.

6. In approximately April 2018, VA Office of General Counsel (“VA OGC”), for reasons described below, sent an email to the VHA FOIA Office advising that a FOIA Appeal

was received stemming from a denial of information rendered by VBA but involving information that VHA had addressed years before.

7. I was aware that VHA had processed the earlier request for data from BIRLS from Ancestry.com. I was aware that John Quinn, Director, National Data Systems (“NDS”) at VHA, was aware of the prior case and as such, I informed him of the appeal for his awareness and for his input regarding the history of the case.

8. Mr. Quinn advised that after the Ancestry.com release, VBA and VHA entered into a Memorandum of Understanding (“MOU”) regarding ownership rights of the BIRLS database and NDS’s use of the data.

Processing of Request 18-03259-F by VHA

9. On or about April 26, 2018, VA OGC responded to Plaintiffs’ April 6, 2018 appeal, copying the VHA FOIA Office, informing Plaintiffs that VA OGC had “determined that the custodian of records for the BIRLS Death File is the [VHA] and not VBA,” and that OGC was referring the Request and appeal to the VHA FOIA Office. A copy of VA OGC’s April 26, 2018 response is attached hereto as Exhibit D.

10. On April 30, 2018, I was advised by VA OGC of its determination that VHA would need to respond directly to the requestor.

11. In approximately May 2018, the Director of the VHA FOIA Office and the Director of the VA’s Information Access and Privacy Office met with OGC Information Law Group Deputy Chief Counsel to discuss the appeal. It is my understanding that in the meeting, VHA reviewed with OGC the Ancestry.com release, summarized as follows: VHA received a request in approximately January 2010 for BIRLS Death File in its possession. The BIRLS Death File is supposed to contain personally identifiable information on deceased individuals,

who by virtue of being deceased have a diminished privacy interest under FOIA. VHA released the BIRLS Death File received from the VBA on March 18, 2011 to Ancestry.com pursuant to FOIA request number 10-02722-F. On December 13, 2011, a complaint was received by the VBA Fargo Regional Office that a Veteran was listed on Ancestry.com as deceased inaccurately. Upon further review of the file sent to Ancestry.com, it was determined that some of the death reports provided by VA regarding certain Veterans were incorrect, and many were erroneously listed as deceased.

12. In the May 2018 meeting, it was determined that VHA was not legally required under FOIA to compound this error by re-releasing the Ancestry.com release. VHA also explained that after the Ancestry.com release, VHA and VBA agreed that VBA would address any future FOIA requests for BIRLS data.

Initial Agency Decision

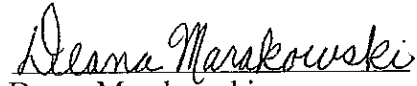
13. On July 26, 2018, I issued VHA FOIA's initial agency decision ("IAD") with appeal rights to Plaintiffs. A true and correct copy of the IAD is attached hereto as Exhibit E. The IAD advised that the March 2011 release to Ancestry.com was erroneous and resulted in a breach of Veterans' personal information. The IAD further stated that the FOIA does not mandate that VHA compound that mistake by continuing to provide the information to the public.

Further Appeal

14. On August 6, 2018, Plaintiffs appealed the IAD to the VA OGC Information Law Group, which handles FOIA Appeals. A copy of Plaintiff's August 6, 2018 appeal is attached hereto as Exhibit F.

15. On August 7, 2018, VA OGC acknowledged Plaintiff's appeal. A true and correct copy of VA OGC's acknowledgement letter is attached hereto as Exhibit G.

Executed this 21 day of June 2019.


Deana Marakowski
VHA FOIA Officer
Veterans Health Administration
Department of Veterans Affairs